INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions involved	2
Statement	3
Summary of argument	7
Argument:	
I. Respondents have no standing to maintain this action	10
II. The complaint does not present a justiciable issue	29
A. A non-justiciable political question is presented if the issue sought to be litigated is committed to a co-ordinate political department of the government	29
B. The determination whether membership in the Armed Forces Reserves bars a person from serving as a member of Congress because it constitutes the holding of an office under the United States is within the exclusive authority of Congress	31
1. The text and structure of the constitutional provision show that the prohibition is a qualification for membership in Congress	31

317-464—72——1

Argument—Continued

II. The complaint, etc.—Continued
B. The determination—Continued
2. The history of Article I, Section 6, Clause 2 shows that it provides a qualification for membership in Congress 33
3. Congress consistently has treated the prohibition in Article I, Section 6, Clause 2, against holding an office under the United States as a qualification for membership 36
III. A commission in the Armed Forces Reserve is not an office under the United States under Article I, Section 6, Clause 2 43
A. The holding of reserve commissions by members of Congress does not involve the evil at which the clause is directed 44
1. The clause was intended to prohibit members of Congress from receiving or holding other federal offices that could lead to domination and corruption of the legislative branch by the executive branch 44
2. The holding of reserve commissions by members of Congress poses no danger of improper influence upon Congress by the executive branch 48

Argument—Continued
III. A commission, etc.—Continued
B. The conclusion that a reserve commission is not an office under the United States is supported by the fact that holders of reserve commissions are not officers of the United States 52
C. Congress has recognized that a reservist does not hold an office under the United States 54
Conclusion 60

CITATIONS

Cases:

Baker v. *Carr*, 369 U.S. 186 ..... 9, 23, 24, 29, 30, 31
Brown v. *Board of Education*, 347 U.S. 483 19
DaCosta v. *Laird*, 471 F. 2d 1146 15
Flast v. *Cohen*, 392 U.S. 83 ..... 7, 13, 23
Frothingham v. *Mellon*, 262 U.S. 447 ..... 13, 21
James, Application of, 241 F. Supp. 858 31
Kentucky v. *Dennison*, 24 How. 6 19
Laird v. *Tatum*, 408 U.S. 1 17
Lamm v. *Volpe*, 449 F. 2d 1202, certiorari denied, 405 U.S. 1075 15
Levitt, Ex Parte, 302 U.S. 633 ..... 7, 16, 17
Linda, R. S. v. *Richard D.*, No. 71-6078, decided March 5, 1973 11
Mississippi v. *Johnson*, 4 Wall. 475 19
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 18
Mottola v. *Nixon*, 464 F. 2d 178 15
Myers v. *United States*, 272 U.S. 52 41
Pacific Telephone Co. v. *Oregon*, 223 U.S. 118 19
Pietsch v. *President of the United States*, 434 F. 2d 861, certiorari denied, 403 U.S. 920 15
Powell v. *McCormack*, 395 U.S. 486 ..... 9, 29, 30, 32, 37
Roudebush v. *Hartke*, 405 U.S. 15 ..... 31, 32

Cases—Continued

Sharrow v. *Brown*, 447 F. 2d 94, certiorari denied, 405 U.S. 968 15
Sierra Club v. *Morton*, 405 U.S. 727 ..... 7, 11, 14, 16, 26, 28
Simmons v. *United States*, 55 Ct. Cl. 56 53
Taussig v. *McNamara*, 219 F. Supp. 757, affirmed *per curiam*, April 6, 1964, certiorari denied, 397 U.S. 834 54
Troutman v. *Shriver*, 417 F. 2d 171, certiorari denied, 397 U.S. 923 15
United States v. *Germaine*, 99 U.S. 508 53
United States v. *Hartwell*, 6 Wall. 385 ..... 9, 43, 52, 53
United States v. *Maurice*, Fed. Case No. 15,747 52
United States v. *SCRAP*, No. 72-535, decided June 18, 1973 ..... 7, 13, 14, 16
Velvel v. *Nixon*, 415 F. 2d 236, certiorari denied, 396 U.S. 1042 15

Constitution, statutes and regulations:

United States Constitution:
Article I, Section 2 ..... 31, 32
Article I, Section 3 ..... 31, 32
Article I, Section 5 ..... 17, 32, 36
Article I, Section 5, Clause 1 ..... 2, 5, 8, 29, 30, 36, 41, 42
Article I, Section 6, Clause 2 ..... passim
Article I, Section 8 22
Article I, Section 9, Clause 8 25
Article III 8, 10, 25, 27
Article III, Section 2 3
First Amendment 18, 22
Fourteenth Amendment 19
Seventeenth Amendment 32
Administrative Procedure Act, Section 10, 60 Stat. 243, as amended, 6 U.S.C. 701 11

Constitution statutes and regulations—Continued

	Page
National Defense Act of 1930, Section 37, 39 Stat. 189, as amended, 5 U.S.C. 2105(d)	9, 43, 54
National Defense Act of 1916, 39 Stat. 166, et seq., as amended	16
39 Stat. 206	57
39 Stat. 208–210	57
10 U.S.C. 267(b)	50
10 U.S.C. 269(b)	49
10 U.S.C. 269(g)	49
10 U.S.C. 273(c)	50
10 U.S.C. 593(b)	50
10 U.S.C. 672(a)	50
10 U.S.C. 672(b)	50
10 U.S.C. 802	49, 50
10 U.S.C. 802(3)	49
10 U.S.C. 1161(a)	50
10 U.S.C. 1161(b)	50
10 U.S.C. 1331	50
10 U.S.C. 1334(a)	50
10 U.S.C. 3360(a)	50
10 U.S.C. 3911	50
10 U.S.C. 5891(a)	50
10 U.S.C. 8360(a)	50
10 U.S.C. 8911	50
32 C.F.R. 125.4	48
32 C.F.R. 136.3	49
Miscellaneous:	
17 *Annals of Congress* 871 (1852)	36
6 Cannon, Precedents of the House of Representatives (1936), § 60–65	36, 39, 40, 53, 58
§ 63–65	
45 Comp. Gen. 405	54
48 Comp. Gen. 699	50
39 Cong. Rec. 3849	53

Miscellaneous—Continued

	Page
72 Cong. Rec. 11881	57
109 Cong. Rec. 8715	40
109 Cong. Rec. 8717	40, 42
109 Cong. Rec. 8718	40
109 Cong. Rec. 10000–10002	40
109 Cong. Rec. 10574–10574	40
109 Cong. Rec. 13211–13214	40
Cooley, *Constitutional Limitations*, (7th ed., 1903)	31
2 Curtis, *History of the Constitution of the United States* (1861 ed.)	44–45
Debates and Proceeding in the United States Congress, 18th Cong., 1st Sess.	37
Department of Defense Directives:	
1200.7, Section V, C, 2 (July 2, 1970)	48, 49
1215.6, Section IV, E, 4 (June 12, 1971)	50
1215.6, Section IV, F, 3 (June 12, 1971)	50
1235.9, Section IV, A, 5 (September 13, 1967)	49
1235.9, Section IV, A, 5, (added March 3, 1970)	50
Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 *Journal of Public Law* 103 (1968)	32
Farrand, *The Records of the Federal Convention of 1787* (1937 ed.):	
Volume I	44
Volume II	33, 34, 35, 45
Volume III	35, 47
Federalist, The (Cooke ed., 1961)	
No. 52	35
No. 76	47
Friendly, *Federal Jurisdiction: A General View* (1973)	27

Miscellaneous—Continued

Hill, *The Minute Man in Peace and War: A History of the National Guard* (1964 ed.) ... 58
1 Hinds, *Precedents of the House of Representatives* (1907) ... 36, 37, 38, 39, 40, 58, 59
Hobbs, *Comments on Powell* v. *McCormack*, 17 U.C.L.A. L. Rev. 129 (1969) ... 32
H.R. 5940, 89th Cong. 1st Sess. ... 41
H. Rep. No. 86, 89th Cong. 2d Sess. ... 58
H. Rep. No. 110, 38th Cong., 1st Sess. ... 37
H. Rep. No. 885, 64th Cong., 1st Sess. ... 53
H. Rep. No. 1884, 71st Cong., 2d Sess. ... 55
H. Rep. No. 2205, 55th Cong., 3d Sess. ... 53, 59
H. Res. 41, 89th Cong., 1st Sess. ... 41
H. Res. 352, 88th Cong., 1st Sess. ... 41
H. Res. 353, 88th Cong., 1st Sess. ... 41
H. Res. 369, 88th Cong., 1st Sess. ... 41
H. Res. 377, 88th Cong., 1st Sess. ... 41
Note, *The Power of a House of Congress to Judge the Qualifications of Its Members*, 81 Harvard L. Rev. 673 (1968) ... 32
Note, *The Supreme Court: 1968 Term*, 83 Harvard L. Rev. 62 ... 20
Note, *Standing-Taxpayers Allowed to Challenge Federal Expenditures*, 42 Temple L.Q. 70, (1968) ... 22
Note, *Reservists in Congress*, 50 Tex. L. Rev. 509 ... 50
Note, *Constitutional Law—Separation of Powers*—Article I, Section 6, Clause 2 Renders a Commission in the Armed Forces Reserve Incompatible with Membership in the Congress, 40 Geo. Wash. L. Rev. 542 (1972) ... 32, 35
Note, *Constitutional Law-Establishment Clause-Standing*, 57 Ill. Bar J. 236 (1968) ... 22

Miscellaneous—Continued

Page
Note, *Constitutional Law-Federal Taxpayer's Standing to Challenge Constitutionality of Federal Statutes*, 17 Journal of Public Law 419 (1968) 22
Note, *Constitutional Law-Standing to Sue: What Remains of the Frothingham Rule?*, 48 Neb. L. Rev. 530 (1969) 22
S. Rep. No. 1102, 71st Cong., 2d Sess. 56
1 Story, *Commentaries on the Constitution of the United States* (5th ed., 1891) 47
Warren, *The Making of the Constitution* (2d ed., 1937) 44
Winthrop's *Military Law and Precedents* (2d ed. reprinted, 1920) 58

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1188

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The court of appeals rendered no opinion. The opinion of the district court (Pet. App. B, pp. 17–36) is reported at 323 F. Supp. 833.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1972. On January 26, 1973, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 28, 1973, and the petition was filed on that day.

511-424—73——2

The petition was granted on April 23, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether respondents have standing, either as citizens or as federal taxpayers, to challenge the right of congressmen to hold commissions in the Armed Forces Reserves as violating Article I, Section 6, Clause 2 of the Constitution, which prohibits any Senator or Representative from "holding any Office under the United States * * * during his Continuance in Office."

2. Whether the complaint presents a non-justiciable issue because it involves the qualifications of members of Congress of which, under Article I, Section 5, Clause 1 of the Constitution, the Congress is the exclusive judge.

3. Whether membership in the Retired and Standby Reserves constitutes an "Office under the United States" within the meaning of Article I, Section 6, Clause 2 of the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 5, Clause 1 of the Constitution provides in pertinent part:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own members * * *.

Article I, Section 6, Clause 2 of the Constitution provides:

> No Senator or Representative shall, during the Time for which he was elected, be appointed

to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Article III, Section 2 of the Constitution provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens of different States,—between Citizens or Subjects.

STATEMENT

This class action was commenced in the United States District Court for the District of Columbia by a national association, Reservists Committee to Stop the War, and several named members thereof, seeking a judicial declaration that all members of the United States Congress who hold commissions in the Armed Forces Reserves do so in violation of Article I, Sec-

tion 6, Clause 2 of the United States Constitution.[1] The complaint asks that defendants, the Secretary of Defense and the Secretaries of the Army, Navy and Air Force, be ordered to remove all active congressmen from the Reserve rolls, be enjoined permanently from adding newly-elected congressmen to the Reserve rolls, and be required to reclaim any reservists' pay that members of Congress may have received during their terms in office. Such relief is claimed on the theory that the Reserve status of members of Congress adversely affects plaintiffs, both individually and as a class, by depriving them of "the unbiased consideration by the Congress and its members of measures before the Congress affecting the military establishment and appropriations therefor, including appropriations for compensation and pensions for members of the Reserves, and measures relating to military action, war and peace" (Pet. App. C, p. 42).

No member of Congress was made a party to the suit. The class allegedly being represented consists of all officers and enlisted members of the Reserves who are not members of Congress, all other citizens and taxpayers of the United States, and any person who, although neither a reservist, a citizen, nor a taxpayer, opposed the United States' military involvement in Vietnam (*id.* at 41–42).

---

[1] The complaint, which is set forth at Pet. App. C, pp. 37–43, alleges that the Committee comprises present and former reservists who oppose the United States' involvement in Vietnam. The individual plaintiffs include the Committee's co-chairman, two officers of the Naval Reserve, an enlisted member of the Air Force Reserve, and an enlisted member of the Army Reserve.

Both sides moved for summary judgment in the district court. Defendants argued that (1) plaintiffs lacked standing to challenge the Reserve status of congressmen, (2) the question raised concerned only the "qualifications" of Senators and Representatives and under Article I, Section 5, Clause 1 of the Constitution, was not subject to judicial scrutiny, and (3) membership in the Reserves was not an "Office under the United States" within the meaning of Article I, Section 6, Clause 2 of the Constitution. Following a hearing, the district court granted plaintiffs' motion insofar as it sought a declaratory judgment that members of Congress are "ineligible to hold a commission in the Armed Forces Reserve during [their] continuance in office" (Pet. App. B, p. 36). The plaintiffs' motion was denied, however, with respect to the claims for injunctive relief and for recovery of reservists' pay.[4]

The court held that plaintiffs lacked standing as reservists and as federal taxpayers but had standing as citizens. Observing that "in this Circuit the concept [of standing] has now been almost completely abandoned" (Pet. App. B, p. 27), the court concluded that "the interest of plaintiffs as citizens is undoubtedly one which was intended to be protected by the consti-

[4] In declining to grant injunctive relief, the court noted that it "must take into account the importance of its action to persons not before the Court, and the fact that any resolution of the matter must necessarily involve coordinate branches of the Government." "In the absence of an urgent necessity," the court stated, it would assume that "Congress and the Executive" will "accommodate themselves voluntarily to the decision * * * having due regard for the special status of Congressmen then seated" (Pet. App. B, pp. 34–35).

tutional provision involved" (*id.* at 31). "[I]f these plaintiffs cannot obtain judicial review of defendants' action," it stated (*ibid.*), "then as a practical matter no one can."

The issue presented, it further held (Pet. App. B, pp. 31–34), was a proper matter for judicial review, notwithstanding that Article I, Section 5, Clause 1 of the Constitution "commits to Congress the decision whether any individual is qualified to sit in Congress" (*id.* at 34). That provision, the court stated (*ibid.*), "does not bar judicial consideration of the question whether executive action must be taken to carry out a constitutional mandate." In its view, since Article I, Section 6, Clause 2 "was intended simply to declare the incompatibility of a seat in Congress and an office in the Executive or the Judiciary" (*id.* at 32), the courts can properly determine whether congressmen must terminate their reserve commissions to satisfy that constitutional requirement.

Finally, on the merits the district court stated that Article I, Section 6, Clause 2 had been added to the Constitution as a result of the Framers' belief "in the principle of separation of powers" and their "desire to avoid the example of England, where, the Framers believed, elected officials had been subverted by appointments to office by the Crown" (Pet. App. B, p. 20). While recognizing "the limited nature of the relationship between the Executive branch and a private citizen who may be an inactive Reserve Officer" (*id.* at 26), the court held that membership in the inactive Reserves is an "office under the United States" under Article I, Section 6, Clause 2 "in light of the

purpose of the Framers, who erected an inflexible barrier against Congressmen holding or being appointed to any other office under the United States" (*ibid.*).

The court of appeals affirmed without opinion, "on the basis of the memorandum opinion of the District Court" (Pet. App. A, p. 16). The court further stated (*ibid.*): "We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962)."

SUMMARY OF ARGUMENT

I

Respondents' complaint asserts that as "citizens and taxpayers of the United States" they have been injured by the presence of Reservists in Congress because such presence deprives them of unbiased consideration of various military matters. Such allegations constitute merely general grievances about the conduct of government, *Flast* v. *Cohen*, 392 U.S. 83, 106, and do not confer on respondents the type of personal stake in the outcome of the controversy sufficient to establish standing. *Ex Parte Levitt*, 302 U.S. 633; compare *Sierra Club* v. *Morton*, 405 U.S. 727, with *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), No. 72–535 (decided June 18, 1973).

No decision of this Court or the federal appellate courts even arguably confers standing upon a citizen who asserts an "injury" to the common interest,

shared by all, in constitutional governance. The absence of support for such standing wisely reflects the understanding that to accept as plaintiffs those who assert ideological interests divorced of any concrete impact would place in jeopardy the role of federal courts under Article III of the Constitution. If so tenuous a nexus with legal issues were accepted as sufficient to invoke the judicial process, the federal courts would be required to give essentially advisory opinions in a rising number of ideological debates.

II

The complaint presents no justiciable issue. Article I, Section 6, Clause 2 of the Constitution prohibits membership in Congress by persons holding any "[o]ffice under the United States." By its terms, history, and long Congressional construction, the Clause constitutes a qualification for membership in the Congress—no one occupying such an office may serve as a Senator or Representative.

In seeking a declaration that this Clause bars inactive Reservists from sitting in Congress and injunctive relief against officials of the Defense Department to prevent alleged violations of this Clause, respondents are attempting to obtain a judicial determination of the qualifications of members of Congress to serve in that body. This is a determination which, under Article I, Section 5, Clause 1 of the Constitution, only the Congress may make. Thus there is a "textually demonstrable constitutional commitment of

the issue to a coordinate political department," and the complaint raises a political question which the courts should not and do not adjudicate. *Baker* v. *Carr*, 369 U.S. 186, 217; *Powell* v. *McCormack*, 395 U.S. 486, 517, 518.

III

A commission in the inactive Reserves is not an "Office under the United States" within the meaning of Article I, Section 6, Clause 2. The history of the Clause shows that the Framers intended it to prohibit members of Congress from receiving or holding other federal offices which could lead to domination and corruption of the legislative branch by the executive branch. The minor and infrequent contacts these reservists have with the military authorities in the executive branch pose none of the dangers the Framers sought to guard against in Article I, Section 6, Clause 2.

Our view is confirmed by judicial decisions establishing that an "officer" of the United States is someone whose duties are "continuing and permanent, not occasional or temporary," because the concept of officer "embraces the ideas of tenure, duration, emolument and duties." *United States* v. *Hartwell*, 6 Wall. 385, 393. Reserve commissions do not have these latter characteristics, as Congress has recognized by passing legislation declaring that a member of the Armed Forces Reserve does not hold an "office of trust or profit * * * under * * * the United States." 5 U.S.C. 2105 (d).

ARGUMENT

I

RESPONDENTS HAVE NO STANDING TO MAINTAIN THIS ACTION

Respondents' complaint alleges that the presence of congressmen in the military reserves deprives them, as "citizens and taxpayers of the United States," of a right to unbiased consideration "of measures before the Congress affecting the military establishment and appropriations therefor * * * and measures relating to military action, war and peace" (Pet. App. C, p. 42). They seek an adjudication that Article I, Section 6, Clause 2 bars congressmen from membership in the military reserves. The district court found that respondents have standing as citizens but not as taxpayers. The court of appeals agreed that citizenship standing exists and appeared to say that taxpayer standing exists as well. We think it clear that standing is not present under either of these theories.

No decision of this Court provides any arguable support for respondents' assertions of standing. Indeed, even those decisions most hospitable to claims of standing expressly disavow the concept's extension to litigants like respondents. This uniformity of precedent reflects, we believe, the Court's recognition that to accord standing where plaintiffs allege only an interest in governmental affairs, common to all citizens and taxpayers, would be to place in jeopardy the role of federal courts under Article III of the Constitution. Were so tenuous a nexus with legal issues to be accepted as sufficient to invoke the judicial process,

the federal courts would be required to give essentially advisory opinions in a rising number of ideological debates.

1. The concept of standing, never sharply defined in any event, has in recent years undergone an expansion accomplished primarily through judicial acceptance of new categories of cognizable injury, such as injuries to health and aesthetic enjoyment. But this multiplication of categories in no way casts doubt upon the importance, and continued existence, of a strictly-enforced requirement that plaintiffs show a personal stake in an issue rather than a generalized interest. *Linda R. S.* v. *Richard D.*, No. 71–6078 (decided March 5, 1973), slip op. at 3–4. Examination of the leading recent cases on standing demonstrates the accuracy of that proposition and the defectiveness of respondents' standing allegations.

In *Sierra Club* v. *Morton*, 405 U.S. 727, the Court held an intense but generalized interest in the subject under dispute insufficient to confer standing. Plaintiff Sierra Club sought a declaratory judgment that the proposed development of Mineral King Valley, a national game refuge, contravened applicable federal laws and regulations, and also sought an injunction restraining the federal officials involved from granting their approval or issuing the requisite permits. Suing as a membership corporation, Sierra Club alleged "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" (405 U.S. at 735, n. 8) and claimed standing under § 10 of the Administrative Procedure Act.

Mr. Justice Stewart's opinion for the majority noted that loss of aesthetic and environmental well-being, like economic well-being, may amount to an injury in fact. *Id.* at 734. But Sierra Club had not alleged that it or its members would suffer any such loss of well-being. There was no allegation, for example, that members of Sierra Club used Mineral King for recreational purposes. The pleadings disclosed only disapproval of the effect of a proposed development upon natural beauty. The Court responded:

> But a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. [405 U.S. at 739—740.]

The interest of respondents here, Reservists Committee to Stop the War, is no more specific, direct, or

personal than that of the Sierra Club. Respondents have only a special interest in what they believe to be the proper construction of a constitutional provision. They allege no direct or immediate harm to themselves, no "injury in fact." They are in the position of the taxpayer in *Frothingham* v. *Mellon*, 262 U.S. 447, who sought, unsuccessfully, "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." See *Flast* v. *Cohen*, 392 U.S. 83, 106.

To be contrasted with *Sierra Club* and the present case is the decision in *United States* v. *Students Challenging Regulating Agency Procedures* (*SCRAP*), No. 72-535 (decided June 18, 1973). Plaintiffs there complained that agency action might harm the forests, streams, mountains and other resources in the Washington Metropolitan Area that they used for camping, hiking, fishing, and sightseeing. That, unlike the *Sierra Club* allegations, provided an assertion of direct injury.[3] The Court's opinion was careful to note that

[3] A relaxation of the standing concept is mistakenly attributed to *SCRAP* because of the vagueness with which the injury was alleged. But that, as the opinion makes clear, was acceptable because the issue was merely the sufficiency of pleadings:

"Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial. But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who

"appellees alleged a specific and perceptible harm that *distinguished them from other citizens* who had not used the natural resources that were claimed to be affected." Slip op., p. 18 (emphasis added). That, of course, is precisely what respondents' allegations in the present suit do not do—the allegations do not distinguish them, in terms of specific and perceptible harm, from any other citizens or taxpayers in the United States.

Since standing still requires an allegation of real injury, as the comparison of *Sierra Club* and *SCRAP* demonstrates, it follows that *Ex parte Levitt*, 302 U.S. 633, is directly in point here. A citizen brought suit to disqualify a Justice of this Court on the ground that his appointment and confirmation violated the "ineligibility" provision of Article I, Section 6, Clause 2 of the Constitution.[4] Standing was so obviously lacking that this Court dismissed the action in a *per curiam* decision:

> The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of

---

had not used the natural resources that were claimed to be affected." [Slip op., pp. 17–18.]

To the railroads' objection that the allegations did not name specific forests, lumbering camps, or extractive facilities in the area, the Court replied that they could have moved for a more definite statement. *Id.*, at 18–19, n. 15.

[4] Levitt relied upon the first half of the clause while respondents here rely upon the second half of the same clause.

> executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. [302 U.S. at 634.]

In the face of this decisional law it is extraordinary that both courts below conferred standing upon respondents.[5]

---

[5] The other federal courts of appeals have repeatedly held, contrary to the opinion below, that a plaintiff who asserts merely his status as a citizen lacks standing to challenge executive or Congressional action. In *Velvel* v. *Nixon*, 415 F. 2d 236, 238 (C.A. 10), certiorari denied, 396 U.S. 1042, the court held that a citizen lacks a "personal stake in the matter" of whether the war in Vietnam was illegal, noting that plaintiff's contention that the war threatens his liberties, creates inflation, and destroys lives are "so patently anything but personal that to pose the question of whether appellant's 'citizen standing' is sufficient, is also to answer it." 415 F. 2d at 238. Granting standing to a citizen as citizen would, the court concluded, permit "every citizen to contest every congressional or executive action of general import and the doctrine of standing will have lost all meaning." *Ibid.*

The same result has been reached in a variety of other contexts. *E.g.*, *Troutman* v. *Shriver*, 417 F. 2d 171, 174 (C.A. 5), certiorari denied, 397 U.S. 923 (citizen lacks standing to challenge constitutionality of Economic Opportunity Act); *Lamm* v. *Volpe*, 449 F. 2d 1202, 1204 (C.A. 10), certiorari denied, 405 U.S. 1075 (citizen lacks standing to challenge constitutionality of Highway Beautification Act); *Sharrow* v. *Brown*, 447 F. 2d 94 (C.A. 2), certiorari denied, 405 U.S. 968 (citizen lacks standing to enforce Fourteenth Amendment requirement that representation in Congress be reduced in proportion to denial of right to vote); *Pietsch* v. *President of the United States*, 434 F. 2d 861, 863 (C.A. 2), certiorari denied, 403 U.S. 920 (citizen lacks standing to challenge legality of war in Vietnam); *Mottola* v. *Nixon*, 464 F. 2d 178, 180–181 (C.A. 9) (same); *DaCosta* v. *Laird*, 471 F. 2d 1146, 1150–1152 (C.A. 2) (same).

2. The district court offered four reasons for that decision but none of them withstands analysis. We will take them up separately.

> First, while any injury which might result from Congressmen holding Reserve commissions is hypothetical, the hypothesis is not concocted by plaintiffs but underlies the constitutional provision itself. Like a conflict-of-interest statute, the constitutional bar addresses itself to the potential for undue influence rather than to its realization. [Pet. App. B, p. 30.]

This argument misconstrues the rationale of the standing concept. The objection to standing here is not that the injury is hypothetical but rather that it is an "injury" only to a general interest, common to all citizens, in constitutional governance. It is a *Sierra Club* or *Levitt* injury rather than a *SCRAP* injury. The analogy to conflict-of-interest statutes is enlightening, for such statutes are, of course, not enforceable in court by any citizen who has merely a general interest in seeing them observed.

> Second, the issue tendered is a narrow one and involves a precise self-operative provision of the Constitution. This is not a case where plaintiffs seek "to employ a federal court as a forum in which to air [their] generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen* [392 U.S.] at 106. [Pet. App. B, pp. 30–31.]

The court suggested, apparently, that standing here will not create too many problems if citizens are confined to litigating "narrow" issues under "precise

self-operative" provisions of the Constitution. The premise is illusory. It is illusory in this very case because, if respondents have standing, this Court is called upon to determine whether the issue is nonjusticiable since it involves the qualifications of members of Congress, and Article I, Section 5 makes each House the judge of the qualifications of its own members, and also whether the holding of the types of reserve commissions involved here constitutes "holding an Office under the United States." These are issues which, it will be seen, are far from "narrow" and whose presence destroys the notion that the clause involved stands alone so that it is either "precise" or "self-operative." Many provisions of the Constitution are seemingly as precise and self-operative, but upon textual, contextual, and historical analysis, few of them turn out to be that way. This one certainly does not.

> Third, the interest in maintaining independence among the branches of government is shared by all citizens equally, and since this is the primary if not the sole purpose of the bar against Congressmen holding executive office, the interest of plaintiffs as citizens is undoubtedly one which was intended to be protected by the constitutional provision involved. [Pet. App. B, p. 31.]

Since one would be hard pressed to think of any constitutional provision not intended to protect the interest of citizens, this passage from the district court's opinion merely urges that cases like *Levitt*, *supra*, *Laird* v. *Tatum*, 408 U.S. 1 (standing lacking

to enforce the First Amendment when plaintiffs could not allege injury to themselves from challenged intelligence operations), *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (standing lacking to enforce the Fourteenth Amendment against a club's racially discriminatory membership policy when plaintiff alleged no desire to be a member), be overruled so that any citizen may litigate any constitutional hypothetical he finds interesting. That is not a reason for finding standing but the abandonment of the requirement of standing.

> Finally, there can be no doubt that this is a "case or controversy" in the common meaning of those words; the parties sharply conflict in both their interests and their views, and the case was ably briefed and argued. It is not irrelevant to note that if these plantiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can. [Pet. App. B, p. 31.]

This was a "case or controversy" only in the non-constitutional meaning of those words. The only controversy is about the meaning of language, and there is only a case because the district court found standing. The reasoning is circular and inadequate. Nor should a court have to withhold its ruling on standing until it sees whether the merits are "ably briefed and argued." The further suggestion that standing exists because no one else may have standing is, whatever its accuracy,* revolutionary in its implications. It means

---

* To the suggestion that an individual claiming title to a position in the reserves held by a Congressman could maintain *quo warranto*, the court replied that the "contingency of such a suit is remote and is unrelated to the question whether a

that standing is to be accorded plaintiffs who have not suffered injury in fact whenever it appears that nobody has suffered injury in fact. That has never been the law and, as we will show, there are good reasons why it should never become the law.

In any event, the district court's remark seems to assume that this provision of the Constitution can be given effect only through litigation. Even if that were true, it would not be enough to accord standing. Article III policies prevent judicial enforcement of other provisions. For example, the duty of a state to extradite a prisoner cannot be judicially enforced, *Kentucky* v. *Dennison*, 24 How. 66; the duty to ensure that laws are faithfully executed may not be judicially compelled, *Mississippi* v. *Johnson*, 4 Wall. 475; and violation of the guaranty of a republican form of government in the states is not assailable in the courts, *Pacific Telephone Co.* v. *Oregon*, 223 U.S. 118.

Moreover, the assumption is erroneous. Congress has explicit authority to safeguard its independence through its power to judge the qualifications of its members, and

---

general public interest is being harmed by the challenged practice of allowing Congressmen to hold Reserve commissions" (Pet. App. B, p. 31). Whether or not the contingency is remote cannot decide the issue, since there are many constitutional provisions which, for one reason or another, cannot be vindicated in courts. Moreover, any such suit would decide the general principle and would, as do many private litigations over particular benefits, vindicate the general public interest. One might as well assert that the litigation in *Brown* v. *Board of Education*, 347 U.S. 483, being about the right of particular black children to attend a few segregated schools, was not related to the general public interest of whether enforced segregation violated the Equal Protection Clause of the Fourteenth Amendment.

Congress has exercised that authority on many occasions.[7] In fact, the Executive has safeguarded the value at stake. The Secretary of Defense has ordered congressmen removed from positions in the reserves that involved any significant degree of activity and pay.[8]

The reasons given by the district court for finding that respondents have standing as citizens are so vulnerable to analysis that the real basis for its decision is probably its observation that "in this Circuit the [standing] concept has now been almost completely abandoned" (Pet. App. B, p. 27).

3. The court of appeals thought the issues in this case occasioned no need for an opinion and relied upon the district court's opinion, adding, however, the remark (Pet. App. A, p. 16): "We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962)." This may have been intended to suggest that *Flast* and *Baker* support, respectively, taxpayer and citizenship standing in this case. In fact, they do not.

Flast created only a very limited exception to the holding in *Frothingham* that a federal taxpayer is without standing to challenge the constitutionality of federal action. The *Flast* opinion said the crucial question is whether the plaintiff has "the personal stake and interest that impart the necessary concrete adverseness to such litigation" so that his invocation of the judicial process will be "consistent with the con-

[7] See *infra*, pp. 36–40.

[8] See *infra*, p. 48, n. 19.

stitutional limitations of Article III." 392 U.S. at 101. For that reason, *Frothingham* was not an absolute bar to taxpayer standing, since a taxpayer "may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case." 392 U.S. at 101.

The Court insisted upon a "nexus between the status asserted by the litigant and the claim he presents * * *." 392 U.S. at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. * * * Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. [392 U.S. at 102–103.]

The taxpayers in *Flast* established the "logical link" between their status as taxpayers and the enactment challenged, because the challenged programs (under the Elementary and Secondary Education Act of 1965) involved substantial amounts of federal tax funds being expended under the General Welfare Clause of Article I, Section 8. The Court considered the second aspect of the test satisfied by the assertion that the expenditure violated the Establishment Clause of the First Amendment, because the history of that Clause showed that it was specifically designed to prohibit the use of the federal taxing and spending power to aid religion. 392 U.S. at 104. The Court expressly reserved judgment on whether there are *any* other clauses in the Constitution that could be considered "specific limitations" on the taxing and spending power sufficient for standing purposes.* Finally, the Court summarized the narrow exception to *Frothingham* being carved out (392 U.S. at 105–106):

> * * * we hold that a taxpayer will have standing consistent with Article III to invoke federal

---

*Mr. Justice Stewart and Mr. Justice Fortas filed concurring opinions (392 U.S. at 114 and 115), expressing their views that *only* the Establishment Clause was a sufficiently specific limitation upon the congressional power to tax and spend to authorize taxpayer standing.

Various commentators have reached the same conclusion as Justices Stewart and Fortas. Note, *Constitutional Law-Establishment Clause-Standing*, 57 Ill. Bar J. 236, 244 (1968); Note, *Constitutional Law-Federal Taxpayer's Standing to Challenge Constitutionality of Federal Statutes*, 17 Journal of Public Law 419, 422–424 (1968); Note, *Constitutional Law-Standing to Sue: What Remains of the Frothingham Rule?*, 48 Neb. L. Rev. 536, 540–552 (1969); Note, *Standing-Taxpayers Allowed to Challenge Federal Expenditures*, 42 Temple L.Q. 70, 75–76 (1968).

> judicial power when he alleges that congressional action [1] under the taxing and spending clause is [2] in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. * * *

Flast, therefore, does not support respondents' claimed taxpayer standing in this case. The opinion requires that each of two tests be met and respondents fail to meet either. By no stretch of the imagination can the situation complained of, the presence of congressmen in the reserves, be called congressional action under the taxing and spending clause. Moreover, the constitutional provision invoked was designed, as respondents and we agree, to prevent domination of the legislative branch by appointment of its members to offices in other branches of government. The provision was not, as required by *Flast*, designed as a limitation upon Congress' power to tax and spend.

The court of appeals' citation of *Baker* v. *Carr*, 369 U.S. 186, in support of respondents' standing here is something of a mystery since nothing about that case suggests, not even remotely or tangentially, that standing exists here. The *Baker* complaint was filed by residents of counties underrepresented in the Tennessee legislature. "Their constitutional claim," this Court noted, "is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting

population." 369 U.S. at 207. The Court had no difficulty finding that the dilution of a citizen's right to vote was an injury sufficient to give him standing:

> A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, cf. *United States* v. *Classic*, 313 U.S. 299; or by a refusal to count votes from arbitrarily selected precincts, cf. *United States* v. *Mosley*, 238 U.S. 383, or by a stuffing of the ballot box, cf. *Ex parte Siebold*, 100 U.S. 371; *United States* v. *Saylor*, 322 U.S. 385.
>
> It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," *Coleman* v *Miller*, 307 U.S., at 438, not merely a claim of "the right, possessed by every citizen, to require that the Government be administered according to law * * *." *Fairchild* v. *Hughes*, 258 U.S. 126, 129; compare *Leser* v. *Garnett*, 258 U.S. 130. [369 U.S. at 208.]

Standing existed in *Baker* v. *Carr* because the state had impaired plaintiffs' vote in comparison with other voters in Tennessee. That was a direct injury to an identifiable group. Perhaps the court of appeals in this case thought the claims here of a right to un-

biased congressmen is the same as the claim to a vote unimpaired by malapportionment. It is not.

The former, being an interest of all citizens in good government, does not confer standing. Respondents' claim is like an attempt by interested citizens to enforce Article I, Section 9, Clause 8 by asking a court to require a congressman to give back a scroll accepted as a gift from the Queen of England. The *Baker* Court was careful to distinguish just such cases, pointing out that plaintiffs' standing did not, and could not, rest on the grievance, common to all citizens, that their state government was not being administered according to law (369 U.S. at 208).

4. The case law that denies respondents standing here grows out of and protects a basic constitutional value: the Article III role of the federal judiciary and the institution of judicial review. It would, we believe, be unwise to place that crucial value in jeopardy, which would be the result if respondents were permitted as citizens to litigate their grievance about congressmen in the military reserve.

The connection between standing in this case and the impairment of the judicial function is easily shown. There are in this nation innumerable organizations and individuals committed to the advancement of special interests and ideological causes of all descriptions. Some of them are, quite legitimately, devoted to litigation as a principal means of attaining their ends, but they can do so only through plaintiffs who can show the injury in fact the standing concept requires. Should this constitutional requirement be

abandoned, there would be an enormous multiplication of the number of groups and persons who would accept with alacrity the opportunity to press their general interests and debate their ideological theorems in federal courts. The adverse practical consequences of such a development for the federal judicial system are apparent.

The problem is frequently put in the form: "the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' *Baker* v. *Carr*, 369 U.S. 186, 204, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast* v. *Cohen*, 392 U.S. 83, 101" (*Sierra Club* v. *Morton, supra*, 405 U.S. at 732). This capsulated statement contains considerations that are worth explicating.

The necessity of adversary presentation requires little comment. It is our traditional mode of discovering facts and framing legal principles. Effective advocacy assists the court by drawing attention to the variety of ways in which facts may be viewed and rules framed, and by sharpening the issues to aid in reaching an informed decision. Lack of adversariness is one reason federal courts have eschewed giving advisory opinions and refuse to hear friendly suits. Dropping the requirement of a personal stake in the controversy would very likely result in a decline in the vigor of adversary presentation in many cases, though in other cases commitment to general causes or ideological stances might provide the needed vigor.

The standing requirement also reduces the number of cases brought to the federal courts. This consideration may not be decisive but it cannot be overlooked at a time when the judiciary is faced with the critical problems of seriously overcrowded dockets and maintaining the quality of its work. See, generally, Friendly, *Federal Jurisdiction: A General View* (1973).

More fundamental issues, deeply implicating Article III policies, appear when we consider that the standing requirement usually insures that issues, particularly the most profound constitutional issues, do not come to the courts as abstractions but in a developed factual context. A state or federal statute called into question, a state or federal executive action challenged, is presented by a party who has suffered a specific injury and can thus demonstrate to the court the way the law or action actually impinges upon him and society. The importance of this factor, subsumed in the phrase "presented * * * in a form historically viewed as capable of judicial resolution," can hardly be overestimated.

Our jurisprudence prides itself on building up great principles, with their necessary qualifications and exceptions, out of repeated decisions of specific controversies. The issues are formulated, the rules announced, and later interpretations qualified by the concrete settings in which the disputes occur. All of this is lost if litigants who do not have a specific in-

terest in a concrete dispute are permitted to challenge the constitutionality of statutes the moment they become effective, without time to see how the statute operates, whom it hurts and in what way. Instead, courts would be asked to decide immediately the abstract constitutionality of measures whose real impacts and problems they cannot possibly fully appreciate or evaluate.

A federal judiciary placed in this position becomes the giver of advisory opinions. Judges will be called upon to assess the constitutionality of the measures enacted by Congress and fifty state legislatures the moment they become law. They will no longer be the community's agency of sober, second thought but rather, in the absence of particularized factual disputes, they will of necessity repeat the legislative process that has just terminated and become something very much like the Council of Revision that the Framers rejected.

Considerations such as these, we believe, underlie this Court's continued insistence upon the standing requirements. The *Sierra Club* opinion notes, citing De-Tocqueville, that "judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury." 405 U.S. at 740–741, n. 16. *Sierra Club* also states that "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, *Muskrat* v. *United States*, 219 U.S. 346 * * *." 405 U.S. at 732, n. 3. Should standing requirements be effectively abandoned, as the district court

viewed the law in the District of Columbia Circuit (Pet. App. B, p. 27) and as respondents here in effect ask, the result would be the same as if Congress had conferred that jurisdiction.

II

THE COMPLAINT DOES NOT PRESENT A JUSTICIABLE ISSUE

The complaint sought a declaration that the holding of commissions in the Armed Forces Reserve by members of Congress violated the prohibition of Article I, Section 6, Clause 2 of the Constitution against membership in Congress by persons "holding any Office under the United States" and injunctive relief against the top officials of the Department of Defense designed to limit and prevent the alleged violations. We submit that the constitutional issue thus raised is not a justiciable controversy because it constitutes an attempt to obtain a judicial determination of the qualifications of members of Congress to serve in that body. That is a determination which, under Article I, Section 5, Clause 1 of the Constitution, only the Congress may make. The complaint, therefore, raises a political question which the courts should not and do not adjudicate. Cf. *Baker* v. *Carr*, 369 U.S. 186, 217; *Powell* v. *McCormack*, 395 U.S. 486, 517, 518.

A. A NON-JUSTICIABLE POLITICAL QUESTION IS PRESENTED IF THE ISSUE SOUGHT TO BE LITIGATED IS COMMITTED TO A COORDINATE POLITICAL DEPARTMENT OF THE GOVERNMENT.

"It is well established that the Federal courts will not adjudicate political questions * * * primarily be-

cause of the separation of powers within the Federal Government" (*Powell* v. *McCormack, supra,* 395 U.S. at 518). One of the touchstones for determining when a case presents a non-justiciable political question is whether there is "a textually demonstrable constitutional commitment of this issue to a coordinate political department" (*Baker* v. *Carr, supra,* 369 U.S. at 217). "In order to determine whether there has been a textual commitment to a co-ordinate department of the Government, we must interpret the Constitution. In other words, we must first determine what power the Constitution confers upon the House through Art. I, § 5 * * *" (*Powell* v. *McCormack, supra,* 395 U.S. at 519).

The precise issue on this facet of the case, therefore, is whether the provision in Article I, Section 5, Clause 1, that "Each House shall be the Judge of the * * * Qualifications of its own members" gives each house the authority to determine whether membership in the Armed Forces Reserves constitutes "holding Office under the United States," which precludes the holder from being "a Member of either House during his Continuance in Office." If, as we contend, the issue relates to the qualifications of members of Congress, then it is for Congress alone, and not for the courts, to make that determination.

The authority of each House to judge the qualifications of its own members necessarily requires that its judgment upon that question be exclusive, since otherwise each House would not in fact be performing that function. Moreover, Congress is in the best position to make that determination, because of its comprehensive

knowledge of the requisites of effective service in the legislature. "Of course each House of Congress, not the Court, is 'the Judge of the Elections, Returns, and Qualifications of its own Members'" (Mr. Justice Douglas, concurring in *Baker* v. *Carr, supra,* 369 U.S. at 242, n. 2; cf. *Roudebush* v. *Hartke,* 405 U.S. 15; Cooley, *Constitutional Limitations,* p. 189 (7th ed., 1903); *Application of James,* 241 F. Supp. 858, 860 (S.D.N.Y.)).

B. THE DETERMINATION WHETHER MEMBERSHIP IN THE ARMED FORCES RESERVES BARS A PERSON FROM SERVING AS A MEMBER OF CONGRESS BECAUSE IT CONSTITUTES THE HOLDING OF AN OFFICE UNDER THE UNITED STATES IS WITHIN THE EXCLUSIVE AUTHORITY OF CONGRESS

1. The text and structure of the constitutional provision show that the prohibition is a qualification for membership in Congress.

Article I, Section 6, Clause 2 of the Constitution provides in pertinent part:

> * * * no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

It prohibits any person from serving "as a Member of either House" while he holds "any Office under the United States." It thus provides as one qualification for membership in the Congress that the member not hold any office under the United States.

In both text and structure this provision is similar to the qualifications for membership in Congress which are contained in Article I, Sections 2 and 3. They provide that "No person shall be" a representative or senator "who shall have not attained" the

ages of 25 and 30 years and have been a citizen of the United States for 7 to 10 years, respectively, and "be an Inhabitant of that State" in which he is chosen. The wording "No person shall be" a representative or senator parallels the structure of Article I, Section 6, Clause 2, that "no Person holding any Office under the United States, shall be a Member of either House."

This Court recognized in *Powell* v. *McCormack, supra,* 395 U.S. at 520, that the three conditions for membership specified in Article I, Sections 2 and 3 are "qualifications." It left open, however, the question whether other constitutional limitations upon membership in Congress, including the prohibition upon membership by any person holding an office under the United States, also are qualifications for membership under Article I, Section 5 (*ibid.*, n. 41). In *Roudebush* v. *Hartke, supra,* the Court subsequently ruled that one of the qualifications for membership in the Senate, which the Senate has power to judge, is the requirement in the 17th Amendment that "a Senator be elected by the people of his State" (405 U.S. at 26, n. 23). The requirement that a member not hold any office under the United States is, we submit, another qualification for membership.[10]

---

[10] Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 Journal of Public Law 103, 108, 115 (1968); Note, *The Power of a House of Congress to Judge the Qualifications of Its Members*, 81 Harvard L. Rev. 673, 674 (1968); Hobbs, *Comments on Powell* v. *McCormack*, 17 U.C.L.A. L. Rev. 129, 147–48 (1969); Note, *Constitutional Law—Separation of Powers—Article I, Section 6, Clause 2 Renders a Commission in the Armed Forces Reserve Incompatible with Membership in the Congress*, 40 Geo. Wash. L. Rev. 542, 549–558 (1972).

2. The history of Article I, Section 6, Clause 2 shows that it provides a qualification for membership in Congress.

Article I, Section 6, Clause 2 provides in its entirety:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

This provision contains two prohibitions: Congressmen, while serving in that capacity, cannot be appointed to any office under the United States; and no person holding such office can become a Congressman. Thus, a person who, while a Congressman, is appointed to another office cannot continue as a Congressman; and no holder of any office, whether he obtained it before or after his election to Congress, can be a member. Both of these limitations constitute qualifications for service in Congress; one who holds any office under the United States, no matter when he obtains it, is ineligible to serve in that body.

The history of Article I, Section 6, Clause 2 confirms the conclusion that it prescribes qualifications for Congressmen. The first draft of the clause submitted by the Committee on Style provided (II Farrand, *The Records of the Federal Convention of 1787*, hereafter cited as "Farrand," p. 180 (1937 ed.)):

> The members of each House shall be ineligible to, and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected: and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards.

In that form, the Clause made members of Congress ineligible to hold any office under the United States during their service in Congress and, in the case of Senators, for one year thereafter. It did not, however, bar someone from becoming a member of Congress—which is what the qualification requirements are designed to control—merely because he already held an office under the United States.

The second portion of Clause 2, making the holders of office ineligible to serve in Congress, was added by the Committee of 11, which considered matters on which decision had been postponed on the floor of the convention (II Farrand, p. 483). That Committee recommended the following substitute language (*ibid.*):

> The members of each House shall be ineligible to any civil Office under the authority of the United States during the time for which they shall respectively be elected—And no Person holding any office under the United States shall be a Member of either House during his continuance in office.

Although there was substantial debate on the "eligibility" portion of Clause 2 (see the discussion in Point III, *infra*, pp. 44–46), there was no debate

on the "membership" portion at the Constitutional convention,[11] and little during the state ratification debates.[12] There is, however, a crucial statement in *The Federalist* which reflects the understanding of the framers that Clause 2 provided qualifications for membership in Congress. In No. 52 of *The Federalist*, Madison wrote:

> The *qualifications of the elected* * * * have been very properly considered and regulated by the Convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States, must at the time of his election, be an inhabitant of the State he is to represent, *and during the time of his service must be in no office under the United States.* [Cooke ed., 1961, pp. 354–355, emphasis added.]

The evolution of Clause 2 thus shows that, "[w]hile the original clause declared Congressmen ineligible for executive office, the final version declares office holders ineligible to be members of Congress—they are not 'qualified' to hold such a position." Note, *supra*, 40 Geo. Wash. L. Rev. 542, 551.

The district court concluded, however, that Article I, Section 6, Clause 2 "was intended simply to declare the incompatibility" of executive office and a seat in

---

[11] Farrand notes only that "The last clause rendering a Seat in the legislature [and] an office incompatible was agreed to nem: con:." II Farrand, p. 492.

[12] See III Farrand, pp. 148, 201, 314. Luther Martin, in his *Genuine Information*, observed that "the acceptance of an office vacates their seat, nor can they be reelected during their continuance in office." III Farrand, p. 201.

Congress, and that Article I, Section 5 "does not bar judicial consideration of the question whether executive action must be taken to carry out a constitutional mandate" (Pet. App. B, pp. 32, 34). While the original version of Article I, Section 6, Clause 2 declared Congressmen ineligible for Executive Office, the final version makes office holders ineligible to be members of Congress. Although the present suit seeks relief only against the Executive Branch, in order to grant such relief the district court was required to decide whether a commission in the Armed Forces Reserve is an office under the United States. That determination, however, involves passing upon the qualifications of Congressman, and under Article I, Section 5, Clause 1, only Congress can exercise that function.

3. *Congress consistently has treated the prohibition in Article I, Section 6, Clause 2 against holding an office under the United States as a qualification for membership.*

For more than 150 years, Congress has treated Article I, Section 6, Clause 2—both the prohibition against any person holding an office under the United States from serving in Congress and that against members of Congress being appointed to any such office—as constituting a "qualification" for membership in Congress, of which, as early as 1807, Congress viewed itself as "the sole judge" (17 *Annals of Congress* 871 (1852)).[13] In 1817 the House held hearings to

[13] The extensive history of Congressional enforcement of Article I, Section 6, Clause 2 is set forth in 1 Hinds' *Precedents of the House of Representatives* (hereafter, "Hinds"), §§ 485-506, pp. 592-636 (1907); and 6 Cannon, *Precedents of the House of Representatives* (hereafter, "Cannon"), §§ 60-65, pp. 64-79 (1936).

determine whether it should refuse to seat Representative Herrick of Ohio, because he had continued to serve as United States Attorney after his election. Although the House voted to seat Herrick after he had resigned that position, its inquiry whether to exclude him established a precedent for future exclusions. 1 Hinds, pp. 602, 624–627. Seven years later (in 1824), the House considered a challenge to the eligibility for membership of Representative John Bailey, who was elected while he was a clerk in the Department of State. Debates and Proceedings in the United States Congress, 18th Cong., 1st Sess.[14]

In 1864 the House considered the case of Frank P. Blair, Jr., who had been elected a representative after he had been appointed a major-general of volunteers. Blair resigned his military office a month after Congress convened. The House resolved that Blair had "decline[d] and disqualif[ied] himself to hold the office of Representative * * *." 1 Hinds, pp. 601–603; See H. Rep. No. 110, 38th Cong., 1st Sess., pp. 9–10. In 1901 the House Committee on the Judiciary concluded that Joseph Wheeler, who had been elected a representative in 1898 while serving as a major-general in the United States volunteers, never was a member of Congress, since "[b]y holding the office in the Army the civil office is declined," and therefore

---

[14] These and other early decisions discussed in the text are to be given great weight in determining the intent of the framers, for "the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787." *Powell* v. *McCormack*, *supra*, 395 U.S. at 547.

"[i]t follows that Joseph Wheeler never held the office of Representative * * *." 1 Hinds, pp. 628–632.

Similarly, Congress has vacated the seats of members who accepted executive office after being seated. In 1803, the House resolved that Representative John P. Van Ness had "forfeited his right to a seat as a Member of this House" because he had been appointed and served in the District of Columbia as a major in the militia, under the authority of the United States. 1 Hinds, pp. 592–593. In 1805, the House resolved that Representative Samuel Hammond had "vacated his seat in this House" because he had accepted a commission under the United States as colonel commandant from Louisiana. 1 Hinds, pp. 593–594. The House Committee on Elections reported in 1846 that Representative Edward R. Baker "has not been entitled to a seat" after he had accepted an appointment and served as colonel of volunteers from the State of Illinois; the House took no action, however, because he resigned his seat. 1 Hinds, pp. 594–595. The House resolved in 1862 that Representative Vandever "has not been entitled to a seat" in Congress "since he was mustered into the military service of the United States" as a colonel in the infantry. 1 Hinds, pp. 597–599. Finally, in 1898 the House Committee on the Judiciary recommended a resolution that four Representatives had "vacated their seats" by accepting commissions in the Army of the United States and being mustered into active duty; the House, however, did not vote on the resolution. 1 Hinds, pp. 612, 620–621.

In addition to considering whether particular Congressmen were disqualified because of their holding

of office, Congress also considered whether certain categories of positions are "Office[s] under the United States" which disqualify the holder for membership. In 1806, following extensive debate over the meaning of Clause 2, the House rejected a resolution that "a contractor under the Government of the United States is an officer within the purview and meaning of the Constitution, and, as such, is incapable of holding a seat in this House." 1 Hinds, p. 622. In 1825, the House debated at length the appointment of members of Congress to executive office, and adopted a resolution calling on the President to submit a list of all members so appointed since the founding of the government. The President complied. 1 Hinds, p. 592, n. 4.

In 1916, the House directed its Judiciary Committee to study whether any Representatives were disqualified "by reason of such Members holding commissions in the National Guard of the various States." 6 Cannon, p. 64. The Committee reported that Representatives holding such commission were disqualified; that the seats of Members accepting such commissions "will at once become vacant"; and that "[t]he only action necessary would be to declare such vacancy by resolution as a matter of convenience and to aid the Speaker and others in discharging their public duties." The House, however, did not act upon the report. 6 Cannon, p. 67 [15]

[15] The House voted in 1919 to pay all arrears of salary of Representatives who had been absent from the House while in the military service of the United States during World War I, with a deduction for their compensation received for such emergency service. 6 Cannon, pp. 67–68.

Congress has also determined that service by members of Congress in various offices, including directors of public institutions and members of presidentially-appointed commissions, does not violate Article I, Section 6, Clause 2. See 1 Hinds, pp. 604–611; 6 Cannon, pp. 69–75.

Although Congress has not decided whether a reserve commission constitutes an office under the United States, it has considered the question. On May 15, 1963, Senator Goldwater raised on the floor of the Senate the question of the propriety of Reservists serving in that body. The merits of the issue were discussed on the Senate floor by Senators Goldwater, Gore, and Hickenlooper. 109 Cong. Rec. 8715–8717. Senator Goldwater pointed out that "the Senate is the judge of the qualifications of its own Members," and, in order to resolve the matter, submitted a resolution which directed the Senate Judiciary Committee "to determine whether the holding of a commission as a Reserve member of any of the Armed Forces by any individual is incompatible with the holding of office by such individual as a Member of the Senate * * *." *Id.* at 8717. The Senate adopted the resolution. 109 Cong. Rec. 8718. Senators Goldwater and Holland subsequently inserted into the Congressional Record material indicating that Reservists may serve in Congress. 109 Cong. Rec. 10000–10002, 10574–10578, 13211–13214.

The Senate Judiciary Committee took no action on the resolution, and the House Judiciary Committee took no action on similar resolutions of the House.

H. Res. 352, 88th Cong., 1st Sess.; H. Res. 353, 88th Cong., 1st Sess.; H. Res. 369, 88th Cong., 1st Sess; H. Res. 377, 88th Cong., 1st Sess.; H. Res. 41, 89th Cong., 1st Sess. Similarly, Congress has not acted on bills that would have required Congressman in the active reserve to transfer to the inactive reserves. *E.g.*, H. R. 5940, 89th Cong., 1st Sess.

As the foregoing discussion shows, Congress repeatedly and consistently has treated the holding of office under the United States as involving the qualifications of its members. In the exercise of its power under Article I, Section 5, Clause 1 to determine those qualifications, it has considered whether the holding of a particular office, either by an individual Congressman or as a general matter, disqualifies the holder from serving in Congress. This consistent interpretation by the Congress of its own authority under the Constitution, like the settled opinion of other expert bodies on matters committed to their jurisdiction, is entitled to great weight. See, *Myers* v. *United States*, 272 U.S. 52, 175, and cases there cited.

The cases discussed above dealt largely with the status and exclusion of individual Congressmen. The present case, on the other hand, involves more than 100 members of Congress (see *infra*, p. 43). It could be argued that since it is unrealistic to think that Congress would take any action that could result in the exclusion of so substantial a portion of its membership, the earlier Congressional precedents should not be interpreted to cover the present situation.

The earlier precedents were cited, however, only to show that Congress consistently has viewed the determination whether a particular office is an office under the United States as involving a qualification for membership, of which it is the sole judge under Article I, Section 5, Clause 1. The fact that the ruling may affect a substantial number of Congressmen is relevant only to the question of the appropriate Congressional action to deal with such disqualification but not the question whether Congress is the body to make the ruling.

In any event, if the Congress were to declare that the holding of reserve commissions disqualifies the holder from serving in that body, it is unlikely that many of its members would either quit that body or be expelled or denied their seats. It is much more likely that they would resign from the reserves. Indeed, in urging the Senate in 1963 to decide whether it is permissile for Senators to serve in the reserve (see *supra*, p. 40). Senator Goldwater stated that if the Senate "decides that a Member of the Senate cannot serve in the Senate at the same time that he is serving as an officer in the Reserves * * * I am sure that we would follow such admonition" (109 Cong. Rec. 8717). There is no reason to believe that most Senators would choose to "follow such admonition" by resigning from the Senate rather than by quitting the reserves.

It is thus for Congress, and not for the courts, to decide the issue on the merits raised in this case: whether members of Congress who hold reserve commissions are barred from serving as "a Member of either House during his Continuance in Office."

III

A COMMISSION IN THE ARMED FORCES RESERVE IS NOT AN OFFICE UNDER THE UNITED STATES UNDER ARTICLE I, SECTION 6, CLAUSE 2.

Our submission is that, in any event, a reserve commission is not an "Office under the United States" as that phrase is used in Article I, Section 6, Clause 2.[16] We rely upon (1) the history of the Clause, which shows that the Framers intended it to prohibit members of Congress from receiving or holding other federal offices which could lead to domination and corruption of the legislative branch by the executive branch, and the fact that the holding of reserve commissions by members of Congress does not pose that danger; (2) judicial decisions holding that an "officer" of the United States is someone whose duties are "continuing and permanent, not occasional or temporary," since the concept of officer "embraces the ideas of tenure, duration, emolument, and duties" (*United States* v. *Hartwell*, 6 Wall. 385, 393)—characteristics which reserve commissions do not have; and (3) federal legislation declaring that a member of the Armed Forces Reserve does not hold an "office of trust or profit * * * under * * * the United States" (5 U.S.C. 2105(d)).

---

[16] In addition to the 107 members of the 93rd Congress who hold reserve commissions, Senator Tower is a boatswain's mate third class in the Naval Reserve. Whatever one may conclude about the status of reserve commissions as offices under the United States, Senator Tower's position is not within that category.

A. THE HOLDING OF RESERVE COMMISSIONS BY MEMBERS OF CONGRESS DOES NOT INVOLVE THE EVIL AT WHICH THE CLAUSE IS DIRECTED.

1. *The Clause was intended to prohibit members of Congress from receiving or holding other federal offices that could lead to domination and corruption of the legislative branch by the executive branch.*

The provision that became Article I, Section 6, Clause 2, which was part of the Virginia Resolutions in the Constitutional Convention, provided that members of Congress would be "ineligible to any office established by a particular State, or under the authority of the United States * * * during the term of service" and for one year thereafter." (I Farrand, pp. 20–21).[14] The resolution was initially adopted without debate (I Farrand, pp. 210–211), but the views of the delegates were developed during a subsequent debate on removing the provision barring appointment to office for a year after the term expired. See I Farrand, pp. 375–377, 379–382.

The delegates knew that "for a long succession of years the votes of members of Parliament had been bought, with money or office, by nearly every minister who had been at the head of affairs." 2 Curtis, *His-*

[14] The resolution also provided that Representatives be incapable of reelection for a period to be specified, and that they be subject to recall. This portion of the resolution was rejected without debate. See I Farrand, p. 210.

[15] The Articles of Confederation had contained a similar ineligibility provision, stating that a State delegate should not be "capable of holding any office under the United States for which he, or another for his benefit receives any salary, fees or emoluments of any kind." Charles Warren, *The Making of the Constitution*, p. 613 (2d ed., 1937).

tory of the Constitution of the United States, pp. 242, 243 (1861 ed.). One delegate referred to "the example of [Great Britain] where men get into [Parliament] that they might get offices for themselves or their friends. This was the source of the corruption that ruined their Govt" (I Farrand, p. 376 (remarks of Mr. Butler)). George Mason agreed that "by the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom [of Great Britain]" (*id.*, pp. 380–381). He added that "it is necessary to shut the door against corruption. If otherwise, they may make or multiply offices, in order to fill them" (*id.*, p. 380).

After a proposal to remove the additional one-year disability failed by a tie vote (*id.*, p. 382), Madison proposed that legislators be barred from appointment only to offices that Congress had established or for which it had increased the emoluments (*id.*, p. 386). John Rutlidge opposed this motion, urging that the legislature be kept "as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption" (*ibid.*). Mason also opposed the motion, referring again to Great Britain (*id.*, p. 387), and the proposal was defeated (*id.*, p. 390). The delegates then voted to delete the requirement barring appointment for one year after the term ended, and made minor editorial changes (*ibid.*).

The provision was referred to the Committee on Detail which modified the language slightly (II Farrand, pp. 129–130). The delegates then rejected a pro-

posal to limit the ineligibility to offices under the United States "for which they, or any other for their benefit, receive any salary, fees, or emoluments of any kind—and the acceptance of such office shall vacate their seats respectively" (*id.*, pp. 282, 284, 287, 289), and deferred further consideration of the Clause after Gouvenour Morris proposed an exception from the ban on appointment to offices for "offices in the army or navy: but in that case their offices shall be vacated," because of the possibility that the citizen most capable of conducting a war might be a member of Congress (*id.*, p. 289). Mr. Randolph, although agreeing to Mr. Morris' exception, opposed striking the Clause "as opening a door for influence and corruption" (*id.*, p. 290).

After the Committee of 11 had considered the Clause, it recommended the substitute language quoted *supra*, p. 34, which introduced the second section of the Clause making the holders of other federal offices ineligible for membership in Congress. Following debate on the first section of Clause 2, during which the delegates adopted the prohibition on appointments "to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased" during the member's term of office (*id.*, pp. 490–492), the Clause was unanimously adopted (*id.*, p. 492). There was no debate on the ineligibility section, Madison noting that "[t]he last clause rendering a Seat in the Legislature and an office incompatible was agreed to nem: con:" (*ibid.*). The Committee on Style then made minor editorial changes (*id.*, pp. 568, 593).

This history shows that the purpose of the "ineligibility" portion of the Clause was to eliminate "any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness" (1 Story, *Commentaries on the Constitution of the United States,* p. 633 (5th ed., 1891)). It sought "to avoid as much as possible every motive for corruption" (III Farrand, p. 148), and, as Madison noted, it was enacted in response to "the great danger [which] was in creating new offices * * *" (*id.,* p. 314). Although the delegates did not discuss the disqualification section, Story suggests that it was intended to prevent "any undue influence from office, either upon the party himself or those with whom he is associated in legislative deliberations" (1 Story, *supra,* p. 635). And in *The Federalist,* No. 76, Hamilton pointed out that the entire Clause 2 "provided some important guards against the danger of executive influence upon the legislative body" (*id.,* p. 514 (Cooke ed., 1961)).

In sum, the history of Clause 2 shows that the Framers' intent was to avoid the possibility of improper influences upon and corruption of members of the legislative branch that could result from the power of the executive branch to appoint members to office. Like many of the provisions of the Constitution, the resolution of this problem was a compromise; the Framers did not bar all such appointments, but only those to offices created or for which the emoluments were increased during the member's term. The corollary protection provided in the second section of the Clause was to insure that persons already subject to

such influence as officers of the United States could not serve in Congress while holding such office. Perhaps the reason for the lack of any debate about this section is that it was obvious that membership in Congress by federal officers necessarily posed precisely the dangers that the Framers were attempting to avoid, and the Committee on Style included the prohibition out of an abundance of caution to make explicit what everyone had assumed would be the situation anyhow.

The two sections of the Clause are thus complimentary, and directed against the same evil: the improper interrelationship between members of the executive and legislative branches that could result if members of the latter also held office in the former. As we now show, the holding of reserve commissions by members of Congress does not pose that problem.

2. The holding of reserve commissions by members of Congress poses no danger of improper influence upon Congress by the executive branch

The 107 members of Congress who hold reserve commissions are in two categories: Standby Reservists and Retired Reservists.[10] Standby Reservists, in turn,

[10] There is a third category of reservists—the Ready Reserve—in which Congressmen cannot serve. Department of Defense Directive 1200.7, § V, C, 2 (July 2, 1970), 32 C.F.R. 125.4(c)(2), directed the transfer of "Members of the Legislative and Judicial Branches" in the Ready Reserves "to the Standby Reserve, the Retired Reserve, or discharged, as appropriate."

Two members of Congress—Representative Montgomery and Senator Saxbe—are in the Army National Guard and thus in the Ready Reserve. See 10 U.S.C. 269(b). Neither may be transferred to the Standby Reserve without the consent of the governor of his state, 10 U.S.C. 269(g); hence DOD Regulation 1200.7, *supra*, could not be applied to them. The district court

may be in active or inactive status.[20] Both categories of reservists, however, have only minimum obligations to and connection with the Armed Forces.

These reservists are not required to participate in military training,[21] they are not generally subject to military discipline,[22] their commissions are "for an indefinite time" and, with certain limitations, are "held during the pleasure of the President."[23] They receive no pay or compensation, except for retirement pay which Retired Reservists receive only if they have com-

---

noted, however, that its decision had no application to these Congressmen (Pet. App. B, p. 23, fn.) Representative Montgomery had informed us that, although he is listed as being in a pay status (Pet. App. D, p. 49), he has declined pay since 1964.

[20] There are 31 Congressmen holding commissions in the Standby Reserve, of whom 19 are in active status and 12 in inactive status (Pet. App. D). (Representative Roberts, listed as a member of the active reserve, is now in retired status.) There are 74 Congressmen in retired status, 58 of whom are not receiving retirement pay and 16 of whom are (*ibid.*). In addition to those shown as retired reservists not receiving retirement pay, Congressmen Frenzel (USNR, Lt. Minnesota), Danielson (USNR, Lt., California) and Thornton (USNR, Lt., Arkansas) are in that category. Congressmen Bennett, shown as a member of the Retired Reserve drawing retired pay, resigned his commission in 1963 and is no longer in the Reserves.

[21] Retired reservists and Standby Reservists on the inactive status list ordinarily are not permitted to drill. See Department of Defense Directive 1235.9, section IV (September 13, 1967), 32 C.F.R. 136.3.

[22] The Uniform Code of Military Justice is inapplicable to Standby Reservists on the inactive status list, and applies to Retired Reservists only when they are receiving hospitalization. 10 U.S.C. 802(5). Active status Standby Reservists are subject to the Code only while on training under orders voluntarily accepted by them. 10 U.S.C. 802(3).

[23] 10 U.S.C. 593(b), 1161 (a) and (b).

pleted a certain amount of service and have reached a certain age, and which is "in the nature of a pension." [24] They are largely ineligible for promotion,[25] their voluntary training is at their own expense,[26] and only active duty Standby Reservists may earn credit for retirement.[27] Active Standby Reservists are subject to being called to active duty for 15 days annually;[28] other than that these Reservists may be mobilized only in the same situation as any other citizen: when Congress declares war or a state of national emergency.[29]

The minor and infrequent contacts these reservists have with the military authorities as a result of their membership in the Reserves pose none of the dangers of domination and corruption of the legislative branch by the executive branch that the Framers sought to guard against in Article I, Section 6, Clause 2. The approximately 100 Reservists in Congress are in no different position from the thousands of other reservists who are not members of the legislative branch. It is unrealistic to think that a member of Congress would

[24] 48 Comp. Gen. 699, 701; see 10 U.S.C. 273(c), 1331, 3911, 8911.

[25] Retired reservists are ineligible for promotion, 10 U.S.C. 3360(a), 5891(a), 8360(a), as are inactive status Standby Reservists. 10 U.S.C. 273(c). Active status Standby Reservists may be promoted but not to the general or flag officer grades. Department of Defense Directive 1235.9, section IV, A, 5 (added March 3, 1970).

[26] Department of Defense Directive 1215.6, section IV, E, 4 and IV, F, 3 (June 12, 1971). As noted above, only active status Standby Reserves may train at all.

[27] 10 U.S.C. 1334(a); Department of Defense Directive 1215.6, *supra*.

[28] 10 U.S.C. 672(b).

[29] See 10 U.S.C. 267(b), 672(a), 802.

be influenced in his decisions and actions by the possibility of either a promotion (of the very limited type available) in the Reserves if he favored the military's position or a denial of promotion or termination of his commission if he took the contrary view. This is not the kind of action the executive branch is likely to use, or that is likely to have any effect, toward influencing the behavior of members of Congress.

Although the district court recognized "the limited nature of the relationship between the Executive branch and a private citizen who may be an inactive Reserve officer," it stated that its holding was necessary "in light of the purpose of the Framers, who erected an inflexible barrier against Congressmen holding or being appointed to any other office under the United States" (Pet. App. B, p. 26). But this statement assumes that membership in the Reserves is an "Office under the United States," which is the issue in the case.

The district court also stated that "while less than one-fourth of the members of the 91st Congress were Reserve officers, those members were disproportionately representated on the Committees concerned with military affairs" (*id.*, pp. 26–27). But it is hardly surprising that members of Congress who have shown their interest and gained experience in military matters through service in the Reserves would be selected to serve on the committees dealing with those matters. Committee assignments understandably are made to take advantage of the members' particular abilities. For example, the Judiciary Committees traditionally have been composed of lawyers. The fact that many

members of the Reserves serve on the military affairs committees neither indicates nor suggests that the Executive Branch is exerting improper influences upon Congress with respect to military matters through members who hold Reserve commissions.

B. THE CONCLUSION THAT A RESERVE COMMISSION IS NOT AN OFFICE UNDER THE UNITED STATES IS SUPPORTED BY THE FACT THAT HOLDERS OF RESERVE COMMISSIONS ARE NOT OFFICERS OF THE UNITED STATES.

Various statutes impose limitations and prohibitions upon officers of the United States. Because there is a close relationship between such officers and offices under the United States—in most, and perhaps all instances, the concepts are co-extensive—the cases defining "officer" of the United States are relevant in determining what constitutes an "office" under the United States.

The leading case is *United States* v. *Hartwell*, 6 Wall. 385. The question was whether a clerk in the office of an Assistant Treasurer of the United States was an officer of the United States, and hence subject to criminal prosecution for violation of a statute punishing embezzlement of government funds by such officers. In holding that the clerk was an officer, the Court stated (p. 393) that the term "office" "embraces the ideas of tenure, duration, emolument, and duties," and pointed out (*ibid.*) that the defendant's "duties were continuing and permanent, not occasional or temporary." See also *United States* v. *Maurice*, Fed. Cas. No. 15,747, p. 1214 (Cir. Ct. Va.). Where, however, the duties are only "occasional and intermittent" and

the individual "is only to act when called on * * * in some special case," he is not an officer of the United States. *United States* v. *Germaine*, 99 U.S. 508, 512.

Under these standards, Congressmen who hold Reserve commissions are not officers of the United States.[*] As explained above (pp. 49–50), their duties are only "occasional and temporary"—they rarely perform any military duties and act only "when called on * * * in some special case"; their position lacks "tenure" or "duration," since they serve at the pleasure of the President; and they receive no "emoluments" during their service.

These considerations are reflected in *Simmons* v. *United States*, 55 Ct. Cl. 56, where the Court of Claims held that an inactive Reservist was not an "officer of the United States" within the meaning of a statute precluding such "officers" from prosecuting claims against the government. The court reasoned that, unlike members of the regular Armed Forces,

> * * * an officer of the Reserve Corps has no salary or emolument of office. He is not in time

---

[*] Congress has itself used the definition set forth in *United States* v. *Hartwell*, *supra*, in determining whether a particular office constitutes an office under the United States within the meaning of Article I, Section 6, Clause 2. It "accept[ed] this as a correct definition" when it considered whether members of the National Guard held an office under the United States in 1916. See H. Rep. No. 885, 64th Cong., 1st Sess., quoted in 6 Cannon, p. 65. Earlier, when it considered whether a wide variety of officers were within the constitutional prohibition, the House Judiciary Committee relied on the definition in *Hartwell*. H. Rep. No. 2205, 55th Cong., 3d Sess., p. 48; see discussion on floor at 39 Cong. Rec. 3849.

> of peace, except perhaps while discharging some duty to which he may have been lawfully called and assigned under the act of June 3, 1916, or other act, amenable to the Army regulations or court-martial. He has no defined duties to discharge * * *. [55 Ct. Cl. at 57.]

See 45 Comp. Gen. 405, which drew a similar distinction in concluding that a Reservist, not on active duty, was not an officer of the United States under the same statute. See, also, *Taussig* v. *McNamara*, 219 F. Supp. 757, 761–762 (D.D.C.), affirmed *per curiam* C.A.D.C., April 6, 1964 (unreported), certiorari denied, 379 U.S. 834 (distinguishing Reserves from Regular Army).

C. CONGRESS HAS RECOGNIZED THAT A RESERVIST DOES NOT HOLD AN OFFICE UNDER THE UNITED STATES

1. In 1930, in response to a ruling of the Attorney General that Reservists were officers of the United States and hence ineligible as lawyers to prosecute claims against the United States, Congress amended Section 37 of the National Defense Act, which dealt with reservists, to provide as follows (the provision is now codified in 5 U.S.C. 2105(d)):

> A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

"[A]n office of trust or profit * * * under * * * the United States" is an "Office under the United States." Congress thus determined in 1930 that inactive reservists—as all the Congressmen who hold reserve commissions are—do not hold offices under the United States.

The district court ruled (Pet. App. B, pp. 25–26), however, that the legislative history of the 1930 statute shows that it had only the "narrow purpose" of overruling the Attorney General's ruling rather than the broader purpose of defining "Office of the United States" as not including reserve commissions. Although the report of the House Committee on Military Affairs stated that a purpose of the bill was "to remedy a condition occasioned by" the Attorney General's ruling, the report further stated that the bill was proposed "so as to more clearly define the status of reserve officers not on active duty or on active duty for training only * * *" (H. Rep. No. 1884, 71st Cong., 2d Sess., pp. 2, 3).

The House Report then quoted with approval the report of the War Department, at whose request the bill was introduced (H. Rep. No. 1884, *supra*, p. 3), which stated:

> The proposed legislation * * * meets deficiencies in existing law which does not clearly define the civil status of reserve officers who are not on active duty or who are on active duty in time of peace. Reserve officers who are members of the bar are therefore in some doubt as to their status in litigation in which the Government is involved. Many other reserve offi-

cers who are interested in the civil affairs of their own States are similarly in doubt as to their status under State constitutions many of which deny State offices to citizens who are officials of the Federal Government.

The report of the Senate Committee on Military Affairs copied the House Report. See S. Rep. No. 1102, 71st Cong., 2d Sess. On the Senate floor, Senator Couzens, who led the discussion on the bill explained the bill's purpose:

> Mr. COUZENS. Mr. President, the bill involves quite an intricate question, affecting reserve officers who may hold office in the Government in addition to the office which they hold in the military service. There is a constitutional inhibition against an officer in the military service holding two offices. There are officers in the Reserve Corps who are Members of the Senate and who are also Members of the House of Representatives, as there are reserve officers holding other governmental positions.
>
> In consultation with the chairman of the Committee on Military Affairs the other day—and I am sorry he is not now present—he went into the matter very thoroughly with me, because of inquiries I was receiving from the reserve officers. I do not believe that I misquote the Senator from Pennsylvania when I say that he doubts whether this proposed legislation will remedy the situation. However, it is an attempt to do so by amending the law so as *to provide that reserve officers shall not be considered as officers referred to in the Constitution.* In order to relieve the officers who are in the Reserve

> Corps and who are holding other governmental offices, from possible liability under the Constitution, it was thought that the passage of this was necessary [72 Cong. Rec. 11881, emphasis added].

Senator Walsh, although stating that it would be of "questionable propriety" to provide that "all laws applicable to officers in the military service of the United States shall not be deemed applicable to reserve officers * * *," also said that "I think it is eminently advisable that some legislation be enacted so that the reserve officers will not fall under the inhibitions to which officers in the Regular Army in active service are subjected * * *" (*ibid.*).

2. The district court relied on a 1916 House Judiciary Committee report concluding that a commission in the National Guard is an "Office under the United States" within the meaning of Article I, Section 6, Clause 2. The 1916 National Guard, however, was quite different from the present inactive Reserves. Under the National Defense Act of 1916, a National Guardsman had to assemble for drill and instruction at least 48 times each year; he had to participate in encampments, maneuvers or other exercises at least 15 days in training each year; he was subject to additional call for encampments, maneuvers or other exercises pursuant to regulations issued by the President; he was subject to military discipline; he received pay and allowances for the performance of his duties. 39 Stat. 206, 208-210. The House Report thus properly concluded that a commission in the Guard in 1916

"embraces the idea of tenure, duration, emoluments, and duties," and that the duties of a 1916 Guardsman were "continuing and permanent, not occasional and temporary." See 6 Cannon, p. 66.

3. The difference in the character of the military service and duties involved also distinguishes the cases discussed in Point II B 3 above, in which Congress and its committees concluded that various military positions constituted offices under the United States which disqualified the holders from membership in Congress. Representative Blair, denied his seat in 1864, had been in command of a corps of troops fighting in Tennessee during the Civil War when Congress met. See H. Rep. No. 110, 38th Cong., 1st Sess., p. 1; see also 1 Hinds, pp. 601–603. Likewise Representative Vandever was actually "mustered into the military service of the United States" as a colonel of volunteers during the Civil War. 1 Hinds, pp. 597–599. Representative Yell, a colonel of volunteers, was serving in Mexico during the Mexican War, 1 Hinds, p. 596, and Representative Baker, also a colonel of volunteers, "exercised" the responsibilities of his military office. 1 Hinds, pp. 594–595.[21] General Wheeler and the other Representatives whom the Judiciary Committee in 1901 recommended be removed from Congress, had been mustered into active duty during the Spanish American War. 1 Hinds, pp. 612, 620–621.

[21] Service in the "Volunteers" involved service on full-time active duty after being mustered into the Army. See Winthrop's *Military Law and Precedents*, p. 87 (2d ed. reprinted, 1920); Hill, *The Minute Man in Peace and War: A History of the National Guard*, pp. 29–30 (1964 ed.).

The earliest precedents involved Representative Hammond, who was appointed as the colonel commandant for the District of Louisiana under the government to be established there, 1 Hinds, pp. 593–594, and Representative Van Ness, excluded after he accepted and exercised the office of major of militia with the territory of the District of Columbia. 1 Hinds, pp. 592–593. This latter position involved an office equivalent to "a species of military police." Winthrop's *Military Law and Precedents, supra,* p. 56, n. 67.

In the one case involving an officer not on active duty, the House Judiciary Committee concluded that Major General Sickles, who was on the retired list when a representative, "was not such an officer as was inhibited by the Constitution from holding a seat in Congress." H. Rep. No. 2205, 55th Cong., 3d Sess., pp. 33, 64. This was in accord with the Committee's general conclusion that "persons on the retired list of the Army do not hold office under the United States in the constitutional sense" (*id.,* p. 64). As the Committee Report explained (*ibid.*):

> These persons are still in the service, but hold no office unless assigned to duty.
>
> To hold an office under the United States the person must occupy a public station or employment conferred by the appointment of government; and it embraces tenure, duration, emoluments, and duties.
>
> * * * * *
>
> And for the reason that retired Army officers are not entitled to promotion, do not perform

duty, and exercise no command, it is held that when retired they cease to be officers.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

DANIEL M. FRIEDMAN,
Deputy Solicitor General.

LEONARD SCHAITMAN,
WILLIAM D. APPLER,
Attorneys.

AUGUST 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978